(1)

90-1078

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1990

ALFRED E. RAMEY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING OFFICE, and JACK D. KEARNS, MAURICE J. MCORTGAT, W.D. CAMPBELL, VIRGINIA ROBINSON and ANNA DELANEY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Is the Judgment dismissing all charges against five United States Government supervisors on the basis of "absolute immunity", without evidentiary hearing, plain error under the authority of Westfall v. Erwin, 108 S.Ct. 580, 98 L. Ed. 2d 619 (1988) and H.R. 4612, the "Federal Employees Liability Reform and Tort Compensation Act of 1988" (Amendment to Title 28 U.S. Code §2671 et seq.), where in a final administrative board ruling the GAO PAB held that (at least) part of the wrongful acts alleged were "strong record evidence of the agency's intent to retaliate" and "in reprisal for protected EEO activities" and, where the wrongful acts alleged, in the complaint dismissed by the trial court, were reprisal in violation of the

1st Amendment, civil fraud, conspiracy and defamation resulting in destruction of plaintiff's career with the United States Government?

II. Where, the trial court found a "prima facie" case of employment discrimination relating to the disputed promotion, should not pretext in the selection process be inferred where:

(1) the selecting official had previously committed acts of reprisal against the complainant;

(2) the selectee (a female) did not possess the stipulated "job description" prerequisites;

(3) strong testimonial evidence of "fudging" of the selectee's scores by the selecting official was given at trial by several witnesses.

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IN THE SUPREME COURT OF THE
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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Mr. Alfred E. Ramey petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinions Below:

The opinion of the United States Court of Appeals for the District of Columbia Circuit, Nos. 87-5304 and 87-5306 is attached as (Appendix C, P. 1c, etc.). The oral ruling of the United States District Court dismissing all personal charges against the petitioner supervisor(s) is attached as (Appendix A, P. 1a, etc.). The oral ruling of the United States District Court dismissing the petitioner's Title VII claim to a disputed promotion is attached as (Appendix B, P. 1b, etc.).

Two rulings of the Administrative Board which were admitted into evidence as part of the administrative record of this case are attached as (Appendix D, P. 1d, etc. and Appendix E, P. 1e, etc.) respectively.

Neither of the administrative decisions underlying this case is reported.

Jurisdiction:

The Order of the United States Court of Appeals for the District of Columbia Circuit (Appendix C) was entered on October 5, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved:

The United States Constitution.

Amendment I

Congress shall make no law *** abridging *** the right of the people *** to petition the government for a redress of grievances.

Statutory

The Federal Employees Liability Reform and Tort Compensation Act of H.R.

4612 provides in pertinent part:

ONE HUNDREDTH CONGRESS OF THE UNITED OF AMERICA

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday, the twenty-fifth day of January, one thousand nine hundred and eighty-eight

AN ACT

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SECTION 1, SHORT TITLE

This Act may be cited as the "Federal Employees Liability Reform and Tort

Compensation Act of 1988".

SEC. 2 FINDINGS AND PURPOSES.

(a) Findings.-The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many

years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) The erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will

seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) Purpose.-It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of

Federal employees with an appropriate remedy against the United States.

SEC. 3. JUDICIAL AND LEGISLATIVE BRANCH EMPLOYEES.

Section 2671 of title 28, United States Code, is amended in the first full paragraph of inserting after "executive departments," the following: "the judicial and legislative branches.".

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which

the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for

money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government-

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed

without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trail petition the court to find and certify

that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all reference thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place

in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to action 1846(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed

to be timely presented under section 2401(b) of this title if-

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by

that invalidation.

SEC. 8. EFFECTIVE DATE.

(a) GENERAL RULE-This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act. [EFFECTIVE November 18, 1988 - Also See Section (b) immediately following].

(b) APPLICABILITY TO PROCEEDINGS-The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

42 U.S.C. §2000e-2

Title VII, §703(a)(1)

DISCRIMINATION BECAUSE OF RACE COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to

discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any

individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

42 U.S.C. §2000e-3(a)

TITLE VII, §704(a)

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-

management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (As amended by P.L. 92-2621, eff. March 24, 1972).

STATEMENT

In 1980, Alfred E. Ramey ("Ramey" or "Petitioner"), a GS-13 professional level accounting systems computer specialist at the United States General Accounting

Office (GAO), learned that, contrary to applicable merit promotion regulations, a female employee had been pre-selected for a promotion to a position for which he believed that he was the most qualified. Ramey believed he was the most qualified on the basis of his 20+ years of experience, the "job description" specifications, and the educational and knowledge prerequisites which he possessed and the selectee did not. Ramey first informally complained to his supervisors who warned him of dire consequences if he applied for the job. Ramey nevertheless applied for the job, and upon rejection, filed a formal Administrative Complaint alleging sex discrimination.

Ramey alleged that based upon job tenure, skills, experience, education and

the "job description", which was stipulated in administrative hearings as the correct job criteria, he was more qualified than any other applicant for the promotion.

One day after he filed his complaint vicious, malicious reprisals began and continued for over seven (7) years. Jack D. Kearns (Kearns or the selecting supervisor) made seven false allegations of professional and personal misconduct. These allegations of misconduct were immediately used as an excuse to deprive Ramey of an in-grade increase.[1]/ Later, after Ramey prevailed at administrative hearing by restoration of the increase

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[1]/ Deprivation of an in-grade increase is the first step toward termination of employment under applicable regulations at G.A.O.

denied him[2]/, a new set of supervisors falsely accused him of improper job performance, under applicable G.A.O. personnel regulations another "first step" for his removal. Pursuant to the second set of false charges Ramey was eventually terminated from the government service. At the time he had over 25 years of government service.

Timely, Ramey sued the responsible supervisors and the agency head in the United States District Court alleging fraud, conspiracy, defamation and prohibited EEO (Title VII) reprisal.

In the meantime in a parallel action Ramey pursued once again his administrative remedies before the United States General Accounting Office

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[2]/ The first administrative hearing granted only partial relief, the disputed promotion was denied him.

Personnel Appeals Board (PAB) alleging, for a second time, reprisal. He partially prevailed in the administrative hearings in that he was restored to a different and less prestigious position and was limited as to costs and fees awarded. The Board found that Ramey's termination "was in reprisal for his protected EEO activities" as the basis for his "restoration". The administrative board found "*** that, prior to Petitioner's filing of his EEO grievances, he had performed acceptably for over ten years." The administrative results were not appealed by G.A.O. management and thus became "final rulings".

Before the administrative determination became final, the Government, in the United States District Court case, moved to dismiss all of the

constitutional, defamation, fraud, conspiracy and reprisal counts on the ground of "absolute immunity", pursuant to the premise of Barr v. Mateo, 360 U.S. 564 (1959). The Government contended that the acts, even if true as Plaintiff alleged, were protected as "within the outer perimeter" of the individual supervisors' duties.

Ramey, through counsel, argued that the acts alleged could **not** possibly be "within the outer perimeter of official duties" because they were, in addition to constituting fraud, conspiracy and defamation, prohibited reprisal and hence in violation of Ramey's 1st Amendment Constitutional rights to seek redress. Since they were also prohibited by Federal Statutes, (Title VII, §704(a)-reprisal) the complained-of acts could

not be given cognizance as within any proper governmental function.

The United States District Court, without evidentiary hearing, but accepting arguendo Ramey's allegations as true, nevertheless adopted the then-prevailing theory of "absolute immunity" and dismissed all counts against the offending supervisors. At trial of the remaining count, the disputed promotion, Ramey proved a "prima facie case" and rested. As part of Ramey's proof the entire administrative record including both sets of hearings were admitted into evidence by the trial court. The government moved to dismiss on the grounds that Ramey had failed to prove a "prima facie case". That motion was

denied[3] and the Government then presented its reasons for giving the promotion to the pre-selected female. The Government called Kearns to testify as to the criteria used for the promotion. The court ignored unrebutted evidence that the selectee did not meet the qualifications contained in the stipulated "job description" and found no "pretext" in the selection process, which included strong evidence of impossibly high scores given the selectee on the job

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[3] The United States Court of Appeals opinion is in error on page 4, ¶2 when it states "On March 25, 1987, at the close of Ramey's case, the government moved for a judgment in Appellees' favor. J.A. at 265. The trial judge, ruling from the bench, granted the government's motion, finding absolutely no evidence of sex discrimination." (Emphasis added). In fact, the court denied the motion at that time finding that Ramey had presented a "prima facie case". Later, after the government's case, the trial court refused to infer pretext and then dismissed the case.

criteria for the $40,000+ accounting systems technical position, dismissing the remainder of Ramey's claims. Ramey appealed to the United States Court of Appeals for the District of Columbia Circuit.

While the appeal was pending before the United States Court of Appeals for the District of Columbia Circuit, the landmark case of Westfall v. Erwin, supra, was decided. That case and the legislation which followed, which has retroactive effect as a provision of the statute, Ramey contends, vindicates his legal position and requires reversal of this case.

Following Westfall, supra, the United States Congress passed "emergency legislation" amending the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., to

clarify Federal Government supervisors' liability for wrongful acts "within the scope of his office or employment", §2679(d)(1) and not a "violation of the Constitution" §2679(b)(2)(A); or "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." §2679(b)(2)(B).

The United States Court of Appeals for the D.C. Circuit, in plain error of law, ignored the effect of Westfall, supra, and the intervening Federal Code enactments which was specifically applicable to the timing of[4]/ this case,

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[4]/ H.R. 4612, the Amendment to the Federal Tort Claims Act, is specifically made applicable to all pending cases. The act was applicable during the period the case was under consideration by the United States Court of Appeals and was specifically argued by Ramey during oral argument. The new law was signed by the President on the very day of oral

and continued to apply the obsolete legal theory of "absolute immunity", affirming the lower court's decision in all respects, and refused thereby to face squarely the question of how prohibited acts of Title VII reprisal could be legally cognizable as being "within the outer perimeter of official duties".

Ramey now petitions for Certiorari to correct the improper shield applied by the lower courts, pursuant to his 1st Amendment Constitutional right to be free to petition for redress, and to correct the application of the principles of Westfall, supra , and the limitation of 28 U.S.C. §2679(b)(2)(A) and (B) limiting the shielding effect to proper and legal acts in performance of official duties or

Footnote 4 (continued)
argument, November 18, 1988. The Court of Appeals, however, apparently ignored the effect of the new law.

position. The trial court never conducted a hearing to determine whether improper acts had been committed. Now, however, after the administrative findings are final--with the weight of a final legal determination--it cannot be said that the alleged acts are "within the scope of proper duties or position"--they have been found to be in reprisal, thus wrongful.

REASONS FOR GRANTING THE PETITION

The landmark case of Westfall v. Erwin, supra and the emergency amendments to legislation that immediately followed (28 U.S.C. §2679(b) make it eminently clear that government employees are only shielded when the acts complained of are within the proper and legal "outer perimeter" of official duties and are discretionary in nature.

Specifically exempted are acts outside

> "*** the scope of his office or employment"***
>
> "(A) which is [and any action] brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." (Amendment by H.R. 4612) (Title 28, §2679(b)(2)(A) and (B)).

This act is by its specific provisions applicable to all cases pending at the time of its enactment (See §8 Effective date). The effect of the Westfall case and the new statute were argued to the United States Court of

Appeals. The new statute was clearly brought to the attention of the court by both parties and simply erroneously ignored by the Court of Appeals.

The acts alleged by Ramey in his original and amended complaints are under Westfall and the new statute, specifically exempted from the shielding effect of Barr v. Mateo, supra. The acts alleged have been found, in a final hearing with res judicata effect, to be acts of reprisal. Those acts therefore cannot be legally cognizable as within the "outer perimeter" of official duties. They have been found to be part and parcel of acts of reprisal. Reprisal, by it very nature, is a violation of the First Amendment right to petition for redress and is also specifically prohibited by Federal Law (Title VII).

Civil fraud and conspiracy likewise, are acts which by no stretch of the imagination can be called proper governmental acts "within the outer perimeter" of official duties and it should be emphasized, those acts are not mere allegations; the acts complained of were found to be "in reprisal" in a final Administrative Order and never appealed, and thus are final with the effect of law for all purposes. Under these circumstances, Ramey is entitled to a trial against the government supervisors who have ruined his career by destroying his credibility and business reputation as a reprisal for his filing of an EEO Complaint against them. If the Government wishes to accept these acts of reprisal as "within the outer perimeter" of official duties then, pursuant to the

newly applicable law, the Government is liable for the massive damage incurred by Ramey as the direct result of the five supervisors' wrongful acts. He therefore must be, under applicable law, afforded the opportunity to prove his damages and receive full redress for damages actually suffered. The judgment below is contrary to applicable case law (Westfall, supra) and Code (28 U.S.C. §2679(b)(2)(A) and (B)).

As to the disputed promotion, if it is indeed proper for a selecting supervisor guilty of reprisal to falsify scores, ratings and to commit the acts of reprisal previously proven by petitioner with impunity, it is no wonder that the entire governmental service is in disarray. The finder of fact, the Honorable District Court Judge below,

simply ignored all of the strong evidence of a long-standing pattern of malicious conduct and dishonesty presented at trial. Petitioner contends that under any standard of evidence, the Court's findings of fact were clearly erroneous and require reversal for new trial in conjunction with the proof of reprisal which should be given great deference in weighing the evidence of credibility of the Government's witnesses and the pattern of tortious acts committed against the petitioner.

This shift in the "credibility scale" should be considered even more important in the situation where wrongdoing by a Government supervisor has been proven. To do otherwise discredits the thousands of honest and industrious government supervisors who do not enter

into schemes designed to destroy those with honest and valid complaints. Barr v. Mateo, supra. and its progeny were never meant to give Government supervisors a right to violate the Federal Law intentionally, for no violation of law, whether Constitutional, statutory or common law, can rightfully be considered a proper governmental function. There can be little doubt that the Congress, in its wisdom, considered this problem and determined to exclude violations of Federal Law from the shielding effect of the "Federal Employees Liability Reform Act".

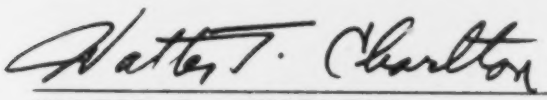
Respectfully, it is suggested that this court should seize this opportunity to teach the lower courts how to apply the new law--both statutory and case law

(Westfall, supra, and its progeny)--enacted while this case was pending.

CONCLUSION:

For the reasons stated above, both the United States District Court and the United States Court of Appeals plainly erred in the application of the teachings of Westfall, supra. and the newly enacted "Federal Employees Liability Reform Act" in this unusual, if not unique, factual situation. Certiorari should be granted to correct this gross misapplication of law and to prevent future misapplication of the wrong rules and standards applied by the lower court's in this case in the interest of justice and honesty in government.

Respectfully submitted,



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Appendix A

The Honorable Judge Thomas P. Jackson's Opinion of March 16, 1984 dismissing all counts against Ramey's supervisors. Page 18, L 19 through Page 21, L 19.

***

MR. CHARLTON: Your Honor, I would like to point out that in our amended complaint, we did mention constitutionally guaranteed civil rights.

THE COURT: All Right. I will assume that you have, but I am now concerned with the rule of Barr v. Mateo and the objective determination of what is without this outer perimeter of duties.

MR. CHARLTON: I understand, your honor. I think the Nixon and Fitzgerald cases are instructive in this matter.

We have alleged that Mr. Kerns [sic] has committed intentional fraud. We have alleged that he has undertaken and carried out, with others, a fraudulent

scheme to deprive Mr. Ramey of his constitutionally guaranteed civil rights.

THE COURT: That's the hard choice that Barr v. Mateo gives us.

MR. CHARLTON: Yes, your honor. But these are factual questions.

THE COURT: Yes. But even Barr v. Mateo pretermits the factual questions as to whether or not the official acted with malice or not. The rule of that case, if I understand it correctly, is to give license to the malicious official to act maliciously in order to protect those who are not acting maliciously, but mistakenly in the exercise and the fulfillment of their public duties.

MR. CHARLTON: Your honor, I think you are focusing exactly on the point, and I don't argue with that. All we say is that somewhere between a mistake and

malice and outright fraud in the preparation of false documents and the suborning of false testimony, there lies a point beyond which a government official has no more right to take a man's livelihood than anyone else does. And we say we can prove these facts, and I have alleged we can prove these facts and if we can't, your honor, so be it. I agree with the government's position. But I say we can prove these facts.

THE COURT: Perhaps you can, but what the Supreme Court said in Barr v. Mateo, if I read it correctly, is that we still have to cloak the government official with this absolute immunity in order to protect those officials who might not act with the same malignant motive.

MR. CHARLTON: Your honor, the Nixon and Fitzgerald case has destroyed that

theory. There is no such thing as absolute immunity.

THE COURT: Nixon and Fitzgerald talks about clearly established Constitutional rights.

MR. CHARLTON: I understand, and President Nixon was given immunity, but all of his henchmen in doing Fitzgerald under went down the drain and paid money. As a matter of fact, I think Nixon did too, but he just made a little mistake.

But what we are saying is if a government official is given a license to commit fraud, to commit perjury, and to commit other violations of the Civil Rights Acts, by entering into these conspiracies, what else can they do?

Barr v. Mateo does not say that, your honor, particularly when read in conjunction with the Fitzgerald case.

The government's position, I submit, is absurd in the factual context that we have outlined. And I am deliberately being very specific as to the facts. Certainly a government official does not have a license to commit perjury and we have it in this case.

THE COURT: All right.

I, in my judgment, am constrained to follow Barr v. Mateo in this case.

I am going to dismiss Mr. Kerns [sic] individually and officially in the case. You may, at some point, be able, Mr. Charlton, to persuade the Supreme Court to reconsider or explicate Barr v. Mateo to the point at which you would be entitled to present the evidence of perjury and conspiracy that you have very expressly and vehemently alleged here, but I think that the rule of Barr v.

Mateo indicates that I have got to dismiss Mr. Kerns. [sic]

***

Appendix B

The Honorable Judge Thomas P. Jackson's Opinion of March 30, 1987, Complaint Dismissed (Entered April 2, 1987) Page 496, L 5 through Page 505, L 25

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THE COURT: And your exhibit number 10, the Executive Appraisal Contract, simply talks about assuring adequate opportunity for minorities and women.

The is no evidence of a policy in G.A.O. to promote minorities or women over better-qualified white males.

MR. CHARLTON: Your honor, I don't believe I have to show a policy for all of G.A.O. All I'm saying is this: Following the standards of Texas Department of Community Affairs versus Burdine and the U.S. Postal Service Board of Governors versus Akins, I must establish a prima facie case.

THE COURT: You did that.

MR. CHARLTON: I did that. You said I did that.

THE COURT: That's right.

MR. CHARLTON: Once I have established a prima facie case, the issue becomes quite simple. The only issue then is is there pretext --

THE COURT: Correct.

MR. CHARLTON: -- In the promotion we're talking about.

THE COURT: Correct.

MR. CHARLTON: I believe that I have submitted evidence before your honor, and there is also now the administrative record.

THE COURT: What in the administrative record?

MR. CHARLTON: May I stay with the evidence before your honor first?

THE COURT: No, because I've heard the evidence, Mr. Charlton. I don't really want an extended argument on it. I know what in my judgment is its probative value.

MR. CHARLTON: The lady is not qualified, by the evidence in this case.

THE COURT: I don't believe that you have proved that.

MR. CHARLTON: I believe we have proved that, your honor.

THE COURT: I disagree, and it's my finding which will control. I do not believe that you have shown her to be unqualified. Whether or not she is less qualified than Mr. Ramey is another matter. But I do not think that you have shown her to be unqualified.

MR. CHARLTON: Your honor, whether she's unqualified or not, which may be

the determinative issue -- I grant that -- I don't think so, but maybe -- depends a great deal on which one of the documents categorizing the position is controlling.

Now, we have in the record at this time -- we have Exhibit Q from the administrative record, which was the document identified, and that document called for a thorough knowledge of various things.

We then have a position description involving audit trails, accrual accounting and various technical accounting elements, which we have in the record.

We then have a job announcement which changes those definitions. It depends a great deal on which one you apply.

Our position is -- and I think it's the correct position -- that given the correct job position, she simply does not qualify.

THE COURT: All right. I don't so find.

Do you have anything further you wish to say?

MR. CHARLTON: Yes, I do.

THE COURT: All right.

MR. CHARLTON: Now, we then come to the question of whether the evidence in this case as to the relative qualifications of each person is sufficiently disparate that you should find that the promotion process whereby she got her promotion is pretextual. And I think the evidence is clear that it has been.

THE COURT: Well, what is it a

pretext for? What is the evidence that it's pretextual for a preference for females rather than any one of innumerable others possibilities?

MR. CHARLTON: You have a pattern here of discrimination with females. You have the pattern of Fran Pereira getting a promotion before she was supposed to.

THE COURT: You mean the testimony of Mr. Dayton? Is that what you're referring to?

MR. CHARLTON: And in the Administrative Record. These things are all documented in the record.

THE COURT: No.

Go Ahead.

MR. CHARLTON: I would request the opportunity, your honor, to file briefs on the subject.

THE COURT: I don't want a brief on

it, Mr. Charlton. You can brief it in the Court of Appeals.

I am going to grant the motion. I do not find evidence of gender discrimination here. I do not find that the reasons given were pretextual. And even if I were to find that there was evidence of pretext here, I don't know what it's pretextual for.

I do not credit Dr. Wysong's testimony at all insofar as credentials are concerned. I think he has been thoroughly discredited.

I do not find credible evidence that the reasons given for Drake's selection over plaintiff for promotion in September, 1980 was pretextual. The superiority of Ramey's qualifications are not apparent to me.

I give no credit at all, as I said,

to Dr. Wysong's testimony.

In any event, the plaintiff has failed to prove to my satisfaction by a preponderance of the evidence that Drake's selection was not based on merit or that she was preselected for the position.

Moreover, even if the reasons given for Drake's selection were pretextual, the evidence does not disclose what they might possibly have been a pretext for. It does not show that they were intended to conceal a preference for her because she was female and because Ramey was a male.

It is as consistent with the evidence that she was selected, if for reasons other than that she was better than Mr. Ramey insofar as her qualifications were concerned, because

she was better liked or because Mr. Ramey was actively disliked, or any one of numerous other hypotheses, which may not be particularly elegant, but, nevertheless, they do not represent sex discrimination.

There is simply no credible evidence here, as far as I'm concerned, of gender playing any part in this employment decision at all.

You have the burden of persuading me that it was, and I do not find that you have done so.

The motion to dismiss is Granted.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 1988 Decided October 5, 1990

Nos. 87-5305 and
87-5306

A. EUGENE RAMEY,
APPELLANT

v.

CHARLES BOWSHER, COMPTROLLER OF
THE UNITED STATES

Appeal from the United States District Court
for the District of Columbia

(Civ. Action No. 82-01644)

Walter T. Charlton, for appellant.

Daniel Bensing, Assistant United States Attorney, with whom *Jay B. Stephens*, *John D. Bates* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for appellees.

Joseph E. diGenova, United States Attorney, *Michael J. Ryan*, *Bradley L. Kelly*, *Royce C. Lamberth*, Assistant United States Attorneys, entered appearances for appellees.

Before: EDWARDS and WILLIAMS, *Circuit Judges*, and ROBINSON, *Senior Circuit Judge*.

Opinion for the Court filed PER CURIAM.

PER CURIAM: Appellant, Alfred Eugene Ramey, contends that his former employer, the General Accounting Office (GAO), discriminated against him on the basis of his sex when it promoted a female coworker to a position for which he had applied, and that several of his former supervisors committed tortious acts against him after he complained. He asks that we reverse the orders of the District Court dismissing his tort claims against the individual supervisors and granting judgment for the Government on his claim of sex discrimination. He also asks that we direct the GAO to award him the promotion with retroactive benefits. Because we can find no merit in Ramey's claims, we affirm the orders of the District Court.

I. BACKGROUND

In late 1980, Ramey, a former GS-13 computer systems analyst in the Financial and General Management Studies (FGMS) division of the GAO, sought a promotion to GS-14. Jack Kearns, a group director in the FGMS division, interviewed Ramey and eight other applicants for promotion to the position of Accounting and Financial Systems Computer Specialist. Kearns rated and ranked each of the applicants based upon eight job elements in the job announcement; subsequently, Kearns awarded the position to Norma Drake, the applicant who had received the highest score during the interview process. Ramey was ranked lowest among all applicants. Upon learning that he had not been promoted, Ramey filed an administrative complaint charging discrimination based on sex. Later,

after being denied a within-grade increase. Ramey amended the complaint to reflect new allegations of retaliation and reprisal.

The GAO Personnel Appeals Board, which has the authority to hear employees' discrimination claims, *see* 31 U.S.C. § 753(a)(7) (1982), determined that Ramey's non-selection had not been due to discrimination. It concluded, however, that Ramey "was denied his within-grade salary increase at least in part because of his having filed a complaint of discrimination against Kearns and other management officials." *See Ramey v. GAO*, 1 PAB R&D 102, 115-19 (Oct. 19, 1981), reproduced in part at Joint Appendix ("J.A.") at 333. Accordingly, the Appeals Board awarded Ramey the requested within-grade salary increase.

Ramey was not satisfied with the decision of the Appeals Board, so he filed the instant action in the District Court against the GAO's Comptroller General and against selecting official Kearns, in his individual capacity. Ramey charged the FGMS division with sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1982), and Kearns with various acts of libel, slander, civil fraud and conspiracy during both the selection process and the subsequent administrative appeal.

The District Court dismissed Ramey's tort claims against Kearns on immunity grounds.[1] *See Ramey v. Bowsher*, Civ. No. 82-0268 (D.D.C. Mar. 16, 1984) (order). Subsequently, after encountering further difficulties on the job which resulted in his termination, Ramey amended his complaint, adding several more former supervisors, in their individual capacities, as defendant tortfeasors. On March 6, 1985, the trial court granted the Government's partial motion to dismiss the additional charges made in the amended complaint, finding that the

[1]Reconsideration was sought by Ramey and denied by the District Court. *Ramey v. Bowsher*, No. 82-0268 (D.D.C. Apr. 24, 1984) (order).

cited supervisors, like Kearns, were immune from suit. The remainder of the case was then set for trial.

On March 25, 1987, at the close of Ramey's case, the Government moved for a judgment in appellees' favor. J.A. at 265. The trial judge, ruling from the bench, granted the Government's motion, finding absolutely no evidence of sex discrimination. J.A. at 269-70.[2] On denial of his motion for a new trial, *see Ramey v. Bowsher*, No. 82-0268 (D.D.C. May 28, 1987) (order), Ramey noted an appeal from the orders of the District Court dismissing his suit against the individual supervisors and granting judgment for the Government on his claim of discrimination. He asserts that, contrary to the District Court's findings, he proved his claim of discrimination.

II. Analysis

A. *Dismissal of the Claims Against the Individual Supervisors on Immunity Grounds*

Ramey argues that the District Court erred when it dismissed the tort claims against the supervisors on immunity grounds. We disagree. We find that each supervisor was entitled to assert his official immunity as an absolute bar to Ramey's tort claims.

In general, federal officials are *absolutely immune* from state-law tort actions when their conduct is "within the scope of their official duties *and* the conduct is discretionary in nature." *Westfall v. Erwin*, 484 U.S. 292, 297-98 (1988) (emphasis in original). Thus, "federal officials are not absolutely immune from state-law tort liability for all actions committed within the outer perimeter of their duties;" rather, an official must demonstrate that he

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[2]Prior to trial, Ramey had moved to dismiss his reprisal and retaliation claims against Bowsher because "full relief as to the reprisal by the Agency" had been granted by the administrative board when Ramey was restored to his job. Brief for Appellant at 12 (emphasis in original). The motion was granted. *Ramey v. Bowsher*, No. 82-0268 (D.D.C. Mar. 19, 1987) (order).

"exercised sufficient discretion in connection with the alleged tort to warrant the shield of absolute immunity." *Id.* at 299. As the Court noted in *Westfall*, "[t]he central purpose of official immunity, promoting effective government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. When an official's conduct is not the product of independent judgment, the threat of liability cannot detrimentally inhibit that conduct." *Id.* at 296-97.

An official who claims absolute immunity from personal liability bears the burden of "showing that such an exemption is justified." *Forrester v. White*, 484 U.S. 219, 224 (1988). The supervisors in the present case clearly have met this burden. First, it cannot be seriously disputed that they acted within the scope of their official duties. The alleged torts committed by the supervisors arose out of their evaluation of Ramey's work performance, their hiring and firing decisions, and their testimony at the administrative adjudicatory proceedings. *See* Tr. 7-16, J.A. at 25-34. We therefore have no trouble concluding that these activities bear "some reasonable relation to and connection with [their] duties and responsibilities." *Little v. City of Seattle*, 863 F.2d 681, 683 (9th Cir. 1988) (citation omitted); *see, e.g., McKinney v. Whitfield*, 736 F.2d at 771 (quoting *Bishop v. Tice*, 622 F.2d 349, 359 (8th Cir. 1980)) ("federal supervisors are generally entitled to absolute immunity 'from liability in tort for actions relating to the discharge of their subordinates' "); *Lawrence v. Acree*, 665 F.2d 1319, 1327 (D.C. Cir. 1981) (per curiam) ("[a] supervisor's candid evaluation promotes efficient government by enabling an agency to identify and correct, and on occasion dispense with, performance that is unsatisfactory. The judgment might be distorted if their immunity from damages arising from that decision is less than complete").

Second, the record in this case indicates that the alleged tortious conduct of the supervisors was "the product of independent judgment," and the "exercise [of] deci-

sionmaking discretion," of the sort described by the Supreme Court in *Westfall*, 484 U.S. at 296-97. As the *Westfall* Court suggested, because of the nature of their job responsibilities, these supervisors remained free to evaluate job performance, make hiring and firing decisions, and testify at administrative adjudicatory proceedings without fearing potential personal liability arising from the exercise of these duties; to hold otherwise would be to "shackle" the supervisors in the exercise of their official duties so as to prevent them from pursuing "vigorous, and effective administration of the policies of government." 484 U.S. at 297. On the record before us, we can find no error in the District Court's ruling that the supervisors' actions were "discretionary" in nature and, thus, protected by official immunity.

We reject appellant's argument that tortious acts are unlawful *per se* and therefore cannot be considered either discretionary or within the outer limits of the official's duties. "No government officer, of course, can be 'authorized' to act unlawfully. But if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity doctrine would be 'completely abrogate[d]'." *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1429 (D.C. Cir. 1987) (quoting *Briggs v. Goodwin*, 569 F.2d 10, 15 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978)).

The question before us is simply whether the supervisors took discretionary action within the outer limits of their official duties. Because we answer that question in the affirmative, we have no occasion to analyze Ramey's common-law tort claims. And to the extent that Ramey attempts to recast his tort claims against the supervisors as pure discrimination claims, they are in any event barred by the exclusive character of the Title VII remedy. *See Brown v. GSA*, 425 U.S. 820, 835 (1976) (Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment").

B. *The Judgment in Favor of the Government on the Claim of Sex Discrimination*

We also can find no error in the District Court's judgment that Ramey was not a victim of sex discrimination. "[A] court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that the finding is clearly erroneous." *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). And "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings." *Id.* at 575. Under this standard of review, Ramey's appeal is plainly unmeritorious.

At trial, Ramey heavily relied upon the testimony of Dr. Earl Wysong, a former employee at the GAO, to establish that his coworker, Ms. Drake, should not have been promoted because she was not qualified for the GS-14 position. Tr. 75, J.A. at 62; *see also* Tr. 478-79, J.A. at 250-52, 263 (testimony of former GAO employee Austin Dayton that Ramey's work was "superior" to Drake's). In short, Wysong claimed that, under the requirements of the position description, Ms. Drake was not fit for the GS-14 job. Tr. 75-76, J.A. at 62-63. On cross examination, however, Wysong conceded that his analysis of Drake's qualifications was based solely on an assessment of documentary evidence; that, during a period when he was also supervising Ramey, he had hired Drake as a GS-13 in the FGMS division and given her performance ratings that were superior to Ramey's, Tr. 80, 102-03, J.A. at 67, 89-90; and that he himself had declined to promote Ramey to a GS-14. Tr. 107-09, J.A. at 94-96; *see also* J.A. at 438, 440-50. Dr. Wysong's credibility was reduced even further when he admitted that he had been forced to accept a downgrade at the GAO after being charged with a violation of

the agency's regulations. Tr. 83-91, 387-89, J.A. at 70-78, 229-31. In light of this evidence, as well as the witness' demeanor, the District Court rejected the testimony of Dr. Wysong as incredible, Tr. 269, and we see no reason to disturb that finding. *See Anderson v. City of Bessemer*, 470 U.S. at 575 (due regard is given to the trial judge's assessment of credibility of witnesses); *Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C. Cir. 1986) (appellate courts should be particularly careful to defer to the district court's credibility findings).

The record also supports the District Court's view that Drake was not only qualified for the position, but probably even better qualified than Ramey. *See* Tr. 103-04, 106-08, J.A. at 90-91, 93-95 (testimony of former supervisor Wysong regarding Ramey's ineffective communication skills and average work performance); Tr. 220-25, J.A. at 127-32 (testimony of former senior supervisor Joseph Donlon regarding Ramey's average performance rating); Tr. 279-84, J.A. at 155-60 (testimony of former supervisor Kearns who rated Drake's skills as "exceptional" and Ramey's skills as "proficient," exceptional being considered the superior rank); Tr. 358-61, 374-75, J.A. at 221-24, 226-27 (testimony of former supervisor Paul Benoit that Ramey's written work was "substandard" and his oral communication skills "were not very understandable," while Drake's performance was "fine" and that she was a "quick learner" and "articulate").

Even assuming, *arguendo*, that Drake was not better qualified than Ramey, there is still nothing in the record to indicate that Drake was selected "because she was a female and [he] was a male." Tr. 500, J.A. at 270; *see International Bhd. of Teamsters v. United States*, 431 U.S. at 335 n.15 (in a disparate treatment case, "[p]roof of discriminatory motive is critical"). Employers have the discretion to choose among qualified candidates, "provided that the decision is not based upon unlawful criteria." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 259. Moreover, "that a court may think that the employer misjudged the qualifications of the applicants does not in

itself expose him to Title VII liability . . . ." *Id.* Here, we agree with the District Court that if any bias influenced Ramey's superiors, it stemmed from the fact that Drake "was better liked or because Mr. Ramey was actively disliked, or any one of numerous other hypotheses, which may not be particularly elegant, but, nevertheless, . . . do not represent sex discrimination." Tr. 500, J.A. at 270.

We also reject Ramey's allegations that the decision to promote Drake was based upon some unlawful scheme of affirmative action. The trial court found that Ramey's qualifications were not superior to those of Drake; that Drake was not "preselected" for the job and that her selection was based on merit, not her sex; and that even if other factors were considered (such as Drake being "better liked" or Ramey being "actively disliked"), these factors did not reflect discrimination on the basis of sex. J.A. at 270. The trial court's findings on these points are not clearly erroneous, and they clearly belie any claim that Drake was somehow the beneficiary of some unlawful scheme of preferential placement.

Ramey advances the further claim that Kearns improperly balanced the scales in favor of Drake when he relied on the criteria listed in the job announcement rather than on the criteria in the position description. Specifically, Ramey avers that the position description required a "working knowledge of the application of automated techniques in a Government agency to accounting and financial management systems . . . ." J.A. at 278, and that there is no requirement of "working knowledge" in the announcement. While it is true that the job announcement does not specifically cite "working knowledge" of accounting, as does the position description, it does state that applicants must possess "[s]kill in applying automatic data processing principles, theories and methodologies to application requirements (*e.g.*, accounting, logistics, etc.) of considerable difficulty . . . and a rough understanding of automated financial management systems." Thus, the position description and job

announcement cannot be viewed as measurably different in any important respects.

Because we find no merit in Ramey's contentions, we have no grounds to question the judgment of the District Court that Ramey was not the victim of sex discrimination.

C. *Alleged Errors in Trial Proceeding*

Ramey's remaining contentions, concerning alleged errors in the trial proceedings, are equally unfounded. First, contrary to Ramey's argument on appeal, we agree with the trial judge that further briefing on the sex-discrimination claim was unnecessary. Ramey's counsel was given a full opportunity to present all relevant arguments and evidence to the District Court before the trial judge ruled from the bench. Indeed, this point was virtually conceded by counsel; just prior to the close of trial, Ramey's counsel stated "the evidence of sex discrimination in this case is implicit in the facts already in the record." Tr. 495, J.A. at 265. Furthermore, the trial judge told Ramey's counsel that, "if it becomes necessary to impeach Mr. Kearns, you are entitled to offer an exhibit at some later point in the trial. You are not foreclosed from offering an exhibit ... simply because you have rested." Tr. 338, J.A. at 202. Finally, there was an extensive argument on the Government's motion for judgment, *see* J.A. at 265-69, during which Ramey's counsel was given full rein to argue his client's case. On the record before us, the trial judge provided appellant with a full and fair opportunity to make his arguments and present his evidence without the necessity of further briefing. Thus, we cannot find that the District Court abused its discretion in denying appellant's request for briefing.

Additionally, even if, *arguendo*, the District Court initially erred in excluding the administrative record of the GAO proceedings and prohibiting the impeachment of certain witnesses, these alleged errors were cured once the trial judge accepted into evidence both the administrative record and impeachment information. *See* Tr. 352-54, J.A.

at 215-17. Furthermore, before its inclusion, Ramey repeatedly used matters from the administrative record in an effort to impeach certain witnesses and to edify the court. *See, e.g.*, Tr. 237, J.A. at 141 (reference to statement by former supervisor Donlon in administrative record that was allegedly inconsistent with statement at trial); Tr. 326, J.A. at 191 (reference to a nuclear regulatory report to impeach testimony of Kearns); Tr. 345-49, J.A. at 208-12 (reading passages of prior testimony by Kearns at administrative proceedings into record for impeachment purposes); Tr. 498, J.A. at 268 (referring to position description and job announcement exhibits from administrative record). *See also* Tr. 56-57, J.A. at 59-60; Tr. 142-43, J.A. at 99-100; Tr. 203-05, J.A. at 110-12, J.A. at 282-300 (introduction and admission of Drake's prior testimony before GAO for impeachment purposes).

On the record before us, we can find no merit in Ramey's claims regarding any alleged errors in the trial proceedings.

III. Conclusion

For the reasons given, the orders of the District Court are affirmed.

It is so ordered.

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APPENDIX D

BEFORE THE
PERSONNEL APPEALS BOARD
U.S. GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C.

ALFRED E. RAMEY, Petitioner	*	
v.	*	Docket 40-209-17-83
GENERAL ACCOUNTING OFFICE Respondent	*	

DECISION OF THE PAB

In this matter, the Board considers the findings of fact and decision recommended in the report of the Hearing Officer appointed by the Board to hear this case.

BACKGROUND

This case involves an appeal by Petitioner Alfred E. Ramey of the denial of his within-grade salary increase in May and July of 1983 and his subsequent removal from employment by the General Accounting Office (GAO or Agency) for alleged performance-based reasons.

During the period in question, Petitioner was employed as a GS-13 Computer Specialist in the Accounting and Financial Management

Division (AFMD) of GAO. Wilbur Campbell was the Acting Director of AFMD. Petitioner was assigned to the Financial Systems Group within AFMD. The primary function of the Financial Systems Group was to review and approve accounting systems in the various agencies of the federal government. Virginia Robinson was the Associate Director in charge of the Financial Systems Group. She was Petitioner's second-level supervisor. His immediate supervisor was, until February 1982, Jack Kearns. When Petitioner filed a discrimination suit against Kearns, he was transferred to the direct supervision of Ms. Robinson. Ms. Robinson supervised Petitioner from February to September of 1982. Maurice Moortgat was Petitioner's supervisor from September 1982 until Petitioner's removal in January of 1984.

In early 1983 Petitioner's supervisors, Moortgat and Robinson, determined that Petitioner's performance had become unacceptable. During the same time period, Petitioner became eligible for a within-grade

salary increase (WIG). According to GAO Order 2531.3, dated December 11, 1980 Petitioner was to be given 60 days advance notice prior to the due date of his salary increase in order to improve his performance. The Agency failed, however, to provide Petitioner with the required 60 days advance notice. Therefore, effective May 18, 1983 he was afforded a 60-day period to improve, after which a new determination would be made. On July 20, 1983 upon completion of the 60-day notice period, Petitioner received a second unacceptable performance rating. In the second rating, Petitioner's work was rated as unacceptable in:

1. Job planning.
2. Data gathering and documentation.
3. Job analysis.

Petitioner was also rated borderline in written communications as well. However, Petitioner was rated as fully successful in:

1. Oral communications.
2. Administrative duties.
3. Maintaining effective working

relationships.

The May 18, 1983 memorandum from Campbell to Petitioner stated that Petitioner's within-grade increase (WIG) denial was based on an evaluation of Petitioner's work on three assignments: 1) the microfiche order, 2) the significant changes definition, and 3) the ADP model documentation project. The memorandum further stated that Petitioner had failed to complete the above assignments "...in a timely manner and with the degree of quality and independence expected of someone at your grade level, GS-13." The July 20, 1983 memorandum notifying Petitioner that his performance was still unacceptable was premised on a single assignment he was given in the interim 60-day period, an assignment referred to by the parties as the OCHAMPUS assignment.

Pursuant to GAO Order 2531.3, Petitioner requested reconsideration of the WIG denial by the Comptroller General. A grievance examiner was appointed (a GAO GS-13 evaluator named Donald Lentz, who worked in a different division from Petitioner). Lentz conducted an

examination, after which he issued a report in which he concluded that Petitioner's work products were either untimely or were not of the requisite quality compatible with Petitioner's grade. Lentz ruled that the denial of Petitioner's WIG should be upheld. The Comptroller General adopted the grievance examiner's report and upheld the WIG denial. Petitioner then appealed to the Board.

On August 5, 1983 Petitioner was notified that his overall performance had been rated as unacceptable and that he was to have a 90-day opportunity period in which to demonstrate improved performance. Petitioner was advised that a failure to improve his performance could lead to a reduction in grade or removal from the service. At the conclusion of the 90-day opportunity period, Ms. Robinson prepared a letter, dated November 18, 1983 proposing the Petitioner's removal. In that letter, Ms Robinson recited various deficiencies in Petitioner's performance during the 90-day period in the three critical job elements as to which he had previously

been rated as unacceptable. The letter stated that not only had Petitioner failed to improve in the three critical areas, but that his performance had also deteriorated in one other category.

By letter dated December 8, 1983 Petitioner was notified by Acting Division Director Wilbur Campbell that he would be removed from his position effective January 7, 1984. The letter was delivered to Petitioner on December 14, 1983. On January 25, 1984 the General Counsel of the PAB sought a stay of 20 days in order to investigate the matter. The motion was granted, and Petitioner's removal was stayed until February 18, 1984. On January 31, 1984 the Agency filed a motion to vacate the stay on jurisdictional grounds, and on February 16, 1984 the Board denied the motion. The Agency then agreed to retain Petitioner in employment status until March 30, 1984 in order to allow for motions to be heard by the U.S. District Court on Petitioner's action in that forum. On March 24, 1984 the General Counsel of the PAB filed a motion to

indefinitely stay Petitioner's removal ont he grounds that the events leading to Petitioner's removal constituted reprisal for Petitioner's exercise of his appeal rights. On April 16, 1984 the PAB issued an order staying the removal of Petitioner pending adjudication of the merits of Petitioner's case before the Board.

The administrative hearing in this matter began on September 26, 1984. During the course of the hearing the Agency made a motion for the vacation of the stay order. Arguments were heard on the motion to vacate. On March 6, 1985 the Hearing Officer issued an order vacating the indefinite stay. On March 8, 1985 Petitioner was removed from the GAO rolls. On April 9, 1985 the General Counsel filed an appeal of the Hearing Officer's order vacating the indefinite stay. The Board elected to grant interlocutory review and, on July 22, 1985 the Board affirmed the order vacating the stay, for the reasons stated in the order.

CONTENTIONS OF PETITIONER

Petitioner contends that the Agency's actions in first denying his within-grade salary increase and then removing him from employment with GAO as a GS-13 Computer Specialist were taken in retaliation for his having filed and pursued an EEO complaint against the Agency. Petitioner argues that the Agency failed to prove by a preponderance of the evidence that he was performing at an unacceptable level of competence when his WIG salary increase was denied. Petitioner further argues that the Agency's decision to remove him is not supported on the record by substantial evidence.

On the specific issue of the denial of Petitioner's within-grade salary increase, Petitioner contends that his performance on the assignments on which the salary increase denial was based warrants a finding that the decision to withhold Petitioner's salary increase must be reversed. Petitioner points to four assignments that provided the basis for the salary increase denial: the Microfiche Order, the Significant Changes

Definition, the ADP Model Documentation Project, and the 60-Day OCHAMPUS Project. Petitioner's performance on the first three assignments provided the basis for the initial decision to deny Petitioner's WIG salary increase. Once Petitioner's performance on these assignments was deemed unacceptable, he was given a 60-day notice period prior to a final determination being made regarding his salary increase. The assignment given to Petitioner during the 60-day notice period was the OCHAMPUS project.

Petitioner's argument regarding these four assignments is bifurcated. Petitioner contends that the manner in which he was assigned and evaluated on his performance on the Microfiche Order, the Significant Changes Definition and the ADP Model Documentation Project does not support the salary increase denial decision. Petitioner further contends that, even if these three assignments prior to the OCHAMPUS project warranted the initial salary increase denial, the Agency failed to meet its burden of proof with regard to the

OCHAMPUS assignment, and therefore, the decision to permanently withhold Petitioner's WIG increase must be reversed. Petitioner argues that the Agency did not sustain its burden of proof because the Agency neither produced sufficient evidence to show that Petitioner was given clear instructions regarding his assignments, nor that the products Petitioner produced were unacceptable. Thus, Petitioner reasons, the Agency's initial determination that his performance was unsatisfactory was not supported by the evidence on the record.

Petitioner also contends that the Agency failed to sustain its burden of proof regarding the 60-day OCHAMPUS assignment. Petitioner argues that the Agency failed to prove by a preponderance of the evidence that the OCHAMPUS assignment was a reasonable (doable) assignment and, by the same standard, that Petitioner's performance on the assignment was unacceptable. Petitioner maintains that the record evidence shows that the OCHAMPUS assignment was either illogical

and impossible to perform or unfair and unreasonable at the time it was assigned, and thus, Petitioner should not be penalized for failing to adequately respond to such an assignment.

With regard to the issue of Petitioner's removal, Petitioner contends that, if the Agency action denying Petitioner's WIG salary increase was not supported by the evidence, then the removal action must be reversed for want of a proper predicate. In the alternative, Petitioner also alleges that harmful error was committed when the Agency failed to consider Petitioner's response to the non-performance charges prior to issuing the removal letter.

Petitioner contends that a retaliatory motive prompted the Agency's actions against him, and that the Agency's claims that his performance was unacceptable were but a pretext for unlawful discrimination.

CONTENTIONS OF RESPONDENT

The Agency contends that it proved by a preponderance of the evidence that Petitioner

was not performing at an acceptable level of competence for a GS-13 Computer Specialist when his within-grade increase was denied. The Agency contends that it proved by substantial evidence that Petitioner's performance on one or more critical elements of his job description was unacceptable and that it based Petitioner's removal on that unacceptable performance. The Agency further contends that Petitioner failed to carry his burden of proof that the motivating factor in the denial of his salary increase and his subsequent removal from employment at GAO was reprisal for the exercise of his appeal rights. Specifically, the Agency argues that an analysis of Petitioner's performance during the relevant period shows that Petitioner failed to acceptably perform the major duties and responsibilities of a GS-13 Computer Specialist.

It is the Agency's contention that Petitioner was given four assignments during the period of July 1981 to November 1983 which required the preparation of written work

products. These assignments were the Microfiche Order, the ADP Model Documentation Project, the 60-Day OCHAMPUS Assignment and the 90-Day Procedures to Implement New Approval Process. The first three projects formed the basis of the Agency's denial of Petitioner's WIG salary increase, and the fourth assignment was given Petitioner as his 90-day opportunity project. The Agency argues that all of these assignments were well within the ability of a GS-13 Computer Specialist; that Petitioner consistently failed to complete any of the assignments in an acceptable manner; that Petitioner consistently failed to follow the instructions of his supervisors to improve his work products; that Petitioner's supervisors were required to spend more time reviewing his work than that of other employees; that Petitioner unilaterally decided that some of his assignments were not worth doing for various reasons, all irrelevant; and that Petitioner did not demonstrate the ability to think or act with the independence required of a GS-13

Computer Specialist.

THE HEARING OFFICER'S REPORT

On October 23,1985 after more than 20-days of hearing in this matter, the Hearing Officer entered her Report containing findings of fact and recommendations to the Board. After first concluding that the proper burden of proof imposed on the Agency was substantial evidence and to a preponderance of the evidence, the Hearing Officer found that substantial evidence in the record as a whole supported the Agency's May 18 and July 20, 1983 determinations to deny Petitioner a within-grade salary increase because his performance was not at an acceptable level of competence. The Hearing Officer also found that there was substantial evidence to support the Agency's evaluation of Petitioner's work as unacceptable during the 90-day opportunity period, and further, that the record as a whole provided substantial evidence that the Agency properly concluded that Petitioner's work performance was unacceptable in several critical job elements, and remained so after

he was given a reasonable opportunity to demonstrate acceptable performance. The Hearing Officer found no procedural errors in the Agency's actions to remove Petitioner. Finally, the Hearing Officer found that there was no evidence in the record by which she could infer that the Agency's actions against Petitioner were motivated by a desire to retaliate against Petitioner, and thus, she concluded, Petitioner had failed to prove by a preponderance of the evidence that GAO's actions in denying Petitioner a WIG salary increase and/or subsequently in removing him from the GAO rolls of employment were taken in reprisal for the exercise of Petitioner's appeal rights.

The Hearing officer in this matter presided over the lengthy hearings in this matter in her capacity as a Member of the Board. Her term of office lapsed several weeks prior to the date of issuance of her decision. Accordingly, as a threshold matter, this Board must face an issue of first impression -- the appropriate scope of review of a decision

issued by an individual who served as a Presiding Member of the Board throughout all active phases of a proceeding, but who issued her decision in other than her capacity as a Member of the Board.

Section 4(h) of the General Accounting Office Personnel Act of 1980 ("Act"), provides that: "The Board may consider, decide, and order corrective or disciplinary action (as appropriate) in cases arising [within the Board's jurisdiction]." The Board's regulations recognize that a Presiding Member of the Board acts on behalf of the entire Board and the decisions of a Presiding Member are final decisions of the Board absent a timely filed Motion for Reopening or Reconsideration of such decisions. Further, this Board has treated interim decisions made by Presiding Members as determinations of the Board, subject, in appropriate cases, to interlocutory Motions for Reconsideration before the Board en banc.

The Board's regulations also allow for the appointment of a Hearing Officer who is not a

Board Member and treats the decisions of those non-Board members differently. The basis for such differing treatment is to avoid any improper delegation of this Board's decisional authority under the Act. Decisions of Presiding Members of the Board are Board decisions; decisions of non-Board Member Hearing Officers, however, are denominated by the Board's Regulations as "Reports of Findings of Fact and Recommendations." 4 C.F.R. Section 28.25. Decisions of Presiding Members are subject to Reopening and Reconsideration only in certain circumstances. This is an appellate type of review parallel in some ways to the type of judicial review provided by the Courts of Appeal to Board decisions. Reports of Findings of Fact and Recommendations, however, are treated differently by the Board's regulations. These require that "based upon th[e] Report [of the Hearing Officer], a member or panel of members of the Board shall issue a decision" in the case. Thus, a Hearing Officer's Report is no more than a recommended decision to the Board.

After the Hearing Officer's term as a Board Member expired, she was, technically speaking, without authority to continue to act and issue a decision of any type in this matter. To remedy this situation, by letter dated October 11, 1985, the Chairman of the Board appointed the Presiding Member as a Hearing officer to hear this matter. It was in that capacity that, on October 23, 1985 she issued her Report of Findings of Fact and Recommendations ("Hearing Officer's Report").

The record in this case spanned more than 20 days of hearing and included well in excess of one hundred exhibits. In this case, the Board recognized its legal obligation to issue a decision, after review of the record, which affirmed or rejected the Hearing Officer's Report, and further recognized that given the history of this case, review of the Board Member or Panel's decision by the entire Board was a strong possibility. Accordingly, the Board determined that it would be most efficient to have the entire Board serve as the reviewing panel of Members and that, to

facilitate that review, each Party would be allowed to further brief its position to the Board. The Parties were notified of this procedure by letter dated October 29, 1985.

On November 6, 1985 Petitioner filed a bill of exceptions to the Hearing Officer's Report and Recommendations. Petitioner argued that the Board should, in its review of the Hearing Officer's Report, make its own credibility determinations. Petitioner also specifically set forth those items of evidence which the Board should review for credibility. Petitioner also contends that it was an error for the Hearing Officer to apply a substantial evidence standard to the Agency's burden of proof on the denial of Petitioner's WIG increase, and instead, the standard should be preponderance of the evidence.

The Agency, in its reply to Petitioner's bill of exceptions, argues that the Board should apply the same deference to the Hearing Officer's Report as it would to a decision by a Presiding Member of the Board, since the Hearing Officer was a member of the PAB

throughout the period of the hearing, up until 23 days before the submission of the Report. The Agency argues that the Hearing Officer made a number of credibility determinations, and that each is supported by substantial evidence on the record as a whole, and that the Hearing Officer did not misapply the burden of proof regarding the denial of the WIG increase.

OPINION

The parties have raised two procedural issues. One is the scope of review of the Hearing Officer's Report. Petitioner advocates that the Board review the Report as a Hearing Officer's Report, which, as noted above, is merely a recommended decision to the Board which, by our regulations, we are not bound to follow. The Agency urges us to review the Report as if it were a decision of a Presiding Member of the Board.

In reviewing a decision by a Presiding Member, the Board will uphold that decision unless there is clear error or unless we find that the decision is not supported by

substantial evidence based on a review of the record as a whole. We need not reach the issue of which standard shall apply, because we would reach the same result regardless of which standard applies. The Board is unpersuaded as to the accuracy of the Hearing Officer's findings, and we do not think those findings are supported by the record evidence viewed as a whole.

The second issue regards the burden of proof to be applied to the Agency's denial of Petitioner's WIG increase in 1983. Petitioner urges the Board to reverse the Agency's action if it cannot be supported by a preponderance of the evidence. The Agency urges that the Board follow our own precedent, as decided in Kienzle v. GAO, 1 PAB 28 (1981) wherein we adopted the ruling that such performance-based actions as Agency determinations regarding the denial of WIG increases must be supported by substantial evidence on the record as a whole. We recognize that there is a conflict in the various United States Courts of Appeals as to whether the preponderance standard (cf., White

v. Department of the Army, 720 F.2d 209 (D.C. Cir. 1983) or the substantial evidence standard (Meyer v. Department of Health and Human Services, 666 F.2d 540 (Ct. Cl. 1981)) applies in WIG increase denials. We agree with the Hearing Officer's determination that Kienzle enunciates the proper standard, as we have reaffirmed in our recent decision in Chen v. GAO, ____PAB____ (1986).

The Board has carefully reviewed the entire record in this matter, and concludes that there is strong and persuasive evidence of reprisal in the Agency actions of denying Petitioner his within-grade increase and the subsequent removal of Petitioner from his position with the Agency. Because the Hearing Officer's Report, in our view, ignores or inadequately analyzes the record evidence regarding the issue of retaliation, we decline to adopt her Recommended Decision.

The Hearing Officer found that substantial evidence in the record as a whole supported the Agency's May 18 and July 20, 1983 determinations to deny Petitioner his WIG

denial, based on his failure to perform at an acceptable level of competence. These determinations were based on the first instance on Petitioner's performance on three major tasks: the Microfiche Order project, the Significant Changes Definition project, and the Model ADP Documentation project.

The May 18, 1983 memorandum from Acting Division Director Campbell to Petitioner stated that the denial of Petitioner's WIG increase was based on his failure to complete any of the three assignments, and that Petitioner's work product was untimely and of an unacceptable quality for a GS-13.

With respect to the first assignment, the Microfiche Order project, however, there are significant contradictions in the Agency's case. Although the WIG denial notice from Campbell states that Petitioner did not complete the assignment, the evidence on the record is inconclusive of that point. Petitioner's supervisor during the project, Virginia Robinson, considered the project a "pioneering effort," fairly complex, and with

no predetermined solutions or guidelines to follow. The uncontroverted evidence on the record shows that Petitioner submitted at least 10 or 11 drafts of the project; the Agency, however, produced no more than four or five drafts, none of which were positively identified in terms of chronology of submission or type of submission. No final draft of Petitioner's work product was produced in order to substantiate the Agency's claim that the final draft was unacceptable. Nor did the record contain any satisfactory explanation for the Agency's failure in this regard. Without resolving any of these inconsistencies in documentary or testimonial evidence, the Hearing Officer nevertheless found that Robinson's evaluation of Petitioner's work on this assignment was supported by substantial evidence on the record as a whole.

With respect to the second assignment, the Significant Changes Definition project, the evidence is undisputed that, shortly after Petitioner was given the assignment, GAO changed its procedures such that the

assignment became obsolete. Notwithstanding the fact that the assignment was withdrawn from Petitioner, the Significant Changes Definition assignment was cited as part of the basis for the denial of the WIG increase. The Hearing Officer discussed the withdrawal of the assignment but failed to address the issue of intent raised by the Agency's reliance upon that withdrawn assignment to support its decision to deny the WIG.

There are also inconsistencies on the record in regard to the third assignment, the Model ADP Documentation project. In Campbell's memorandum transmitting the notice of WIG increase denial, he states that the assignment was never completed, and that the first draft was two weeks late and the second draft was four weeks late. However, Maurice Moortgat, who was Petitioner's supervisor during the relevant period of the ADP Model Documentation project, testified that the drafts probably were on time, and that he may have received a final product from Petitioner, but that after he (Moortgat) submitted the final draft to

typing, he did not remember what happened to it. Again, these inconsistencies are not resolved by the Hearing Officer.

On the basis of Petitioner's performance on these three assignments,the Agency denied Petitioner his WIG increase. In notifying Petitioner of this decision, Campbell informed Petitioner that he would get a 60-day improvement period during which, if he performed acceptably, he would be able to recover his WIG increase. The assignment given to Petitioner during this period was the 60-day OCHAMPUS assignment, which Petitioner received in a May 24, 1983 memorandum from Moortgat. The OCHAMPUS assignment was to be completed under a new Systems Approval Methodology outlined to the Financial Systems Group in a May 10, 1983 memo from Robinson to the staff. The purpose of the new approval method was to test financial accounting systems using a risk-oriented methodology. It is based on three essential performance phases. The first phase is to identify areas of potential problems, or risks, in the

system. This is the General Risk Assessment (GRA) process. By performing this task, one can then determine which steps, or transactions, in the accounting system are more susceptible to fraud, or other problems, and which areas are in need of the least controls. The steps in the process in need of least controls are then eliminated from further consideration. By analyzing the flow of the remaining transactions in the process, one can then determine which the remaining steps in the accounting process are susceptible to the most (and least) risk potential. This is the Transaction Flow Review (or Analysis) phase (TFR). When the transactions in the process that possess the greatest risk potential for fraud or mistake have been identified, test plans are then developed to determine if the safety features in the program actually work to prevent the financial loss associated with fraud or waste. The test plan could not be developed without first doing the GRA and TFR.

Petitioner submitted two products in

response to this assignment, one on June 13, 1983 and one on July 15. Shortly thereafter, he was again rated unacceptable by Moortgat. As a result, Petitioner received another memorandum from Campbell (July 20) informing him of his unacceptable rating and the second (and final) denial of his WIG increase. The Hearing Officer found that there was substantial evidence on the record to support the Agency's determination that Petitioner's performance on this assignment was unacceptable. However, in doing so, she fails to address portions of the record which, in the Board's opinion, demand further analysis.

It is absolutely clear on the record that Petitioner's two relevant supervisors during the OCHAMPUS assignment, Robinson and Moortgat, changed their testimony during the hearing. The Hearing Officer acknowledges this point, but fails to accord it any weight. Robinson and Moortgat both testified that the OCHAMPUS assignment required Petitioner to merely plan the GRA, plan the TFR and plan the model test (plan-plan-plan). However, all of

the witnesses who understood the system testified (and the Hearing Officer found) that the assignment, as written, could only mean do the GRA, do the TFR, and do the test plan (do-do-do-). Even Robinson and Moortgat had originally stated (when deposed)that the assignment was "do-do-do." While there was a divergence of opinion with the witnesses as to whether or not "do-do-do" was practicable in the 60-day timeframe allotted to the assignment, they were unanimous that "plan-plan-plan" was illogical and unreasonable. The Hearing Officer states she does not know why Moortgat and Robinson would deliberately change their testimony, but accords their self-contradiction little weight in the decision.

It was also acknowledged by the witnesses that the OCHAMPUS assignment, in order to be completed properly, required the assistance of an accountant with the computer specialist. Petitioner originally had an accountant, Ernie Porter, assigned to work with him. Porter was reassigned, and a new accountant, Booth, was

assigned to work with Petitioner. However, Moortgat never told Petitioner that a new accountant had been assigned to work with him. Petitioner testified that he worked on the assignment thinking no accountant was available to him.

The Hearing Officer gives much deference to the testimony of Richard Jason, an expert witness for Petitioner (but called by the Agency during their case-in-chief, over the objections of Petitioner's counsel). Jason testified that the OCHAMPUS assignment was a "do-do-do", and that it was a reasonable assignment for a GS-13 computer specialist. Jason further testified that Petitioner's work products for the OCHAMPUS assignment were inadequate. However, on cross-examination, Jason testified that the entire concept of "plan-plan-plan" was illogical; that the assignment could take more than 60 days; that the test plan methodology was new to the government and new to GAO; and that there were no procedures in place to implement the methodology. While stating that Petitioner's

work product was unacceptable if the assignment was "do-do-do", Jason testified that anyone thinking that the assignment was "plan-plan-plan" did not understand risk-oriented methodology. Finally, Jason testified that if there was any confusion between "do-do-do" and "plan-plan-plan", the assignment was impossible, and that if Moortgat said the assignment was "plan-plan-plan", then everything in the record wa sin conflict with that statement and was confusing.

There are other inconsistencies on the record that are not, in our view, adequately addressed. Robinson's personal secretary, Gloria Gatewood, testified that Moortgat had given her a memorandum to type on July 14, 1983. The content of the memorandum was to grant Petitioner's WIG increase, and Gatewood stated that she type the memorandum and then placed it on Robinson's desk for her approval. Moortgat and Robinson professed to have no knowledge about the documents typed by Gatewood that purported to grant Petitioner's

WIG increase. Petitioner produced copies of the memorandum. While not denying that he may have authored such a document, Moortgat testified that he could not remember the document. The Hearing Officer credits Gatewood's testimony as to authorship of the memorandum on a basis which lacks record support and which rationale was specifically denied by Moortgat.

Viewing the record as a whole, the Board finds there is a real question as to whether there is substantial evidence to support the Agency's claims that the Petitioner's performance both prior to the WIG denial and also during the opportunity period was unacceptable. Even assuming, arguendo, that there is substantial evidence on the record to support the Agency's claims, the evidence regarding retaliation is sufficient to raise this matter to the level of a mixed motive case. And in a mixed motive case, when an employee has proven that his participation in protected activity was a motivating factor in the employer's decision to discharge him, even

the existence of a legitimate reason for the discharge will not necessarily prevent the discharge from being illegal. Allen v. N.L.R.B, 105 LRRM 1169 (1980), enforced, 108 LRRM 2513. Moreover, once the employee has made a showing that his protected activity played a role in the decision to terminate him, the burden shifts to the employer to show by a preponderance of the evidence that the termination would have occurred even absent the employee's protected conduct. Transport Management Corp. v. N.L.R.B., 462 U.S. 393, 113 LRRM 2587 (1983). See also, Day v. Weinberger, 530 F.2d 1083 (D.C. Cir. 1976).

The remaining issue is whether the denial of Petitioner's within-grade salary increase and Petitioner's subsequent termination were in retaliation for having filed EEO grievances against GAO and GAO officials.

It is well established (and the Agency does not dispute) that if it is demonstrated that the Agency took personnel actions against the Petitioner in reprisal for his exercise of statutorily protected appeals rights, then the

underlying personnel actions constitute prohibited personnel practices which must be overturned. In the instant case, the record contains both direct evidence of such unlawful intent by Agency supervision and also much evidence of such unlawful intent by Agency supervision and also much evidence which is difficult to explain and which, in our opinion, borders upon compelling that an inference of improper motivation be drawn. The remainder of the Board's Decision will analyze the record evidence regarding unlawful reprisal.

As discussed previously, the basis for the denial of Petitioner's WIG and his termination was his alleged failure to acceptably perform his duties as a computer specialist over a period of approximately 18 months. Specifically, Petitioner is alleged to have failed to complete several projects in a timely and acceptable manner: 1) the Microfiche Order; 2) the Significant Changes Definition; 3) the ADP Model Documentation Project; and 4) the OCHAMPUS Project.

The Agency's case was principally presented in the form of testimony by two witnesses, Robinson and Moortgat, and the documentary exhibits introduced through their testimony. Robinson and Moortgat testified to the effect that the assignments Petitioner received, both before and during his trial periods, were relatively simple and always reasonable and within the normal scope of duties for a GS-13 Computer Specialist.

The direct evidence of improper intent involves primarily the Petitioner's first and second level supervisors - Virginia Robinson, Associate Director of the Financial Systems Group, and Maurice Moortgat, Group Director in the Accounting and Financial Management Division. Further, although there was no specific showing the Wilbur Campbell, the individual who acted as the Deciding Official for Petitioner's denial of WIG increase and for Petitioner's removal, harbored such animus, the evidence is clear that Mr. Campbell made no independent review of Petitioner's work and relied solely upon the

conclusions of Ms. Robinson as to the adequacy of Petitioner's work product. Accordingly, any animus possessed by Ms. Robinson and which infected her recommendations must be viewed as fatal to the Agency's decisions which are under review herein.

Dealing first with the direct evidence of animus and intention to retaliate against Petitioner, we note that following the Petitioner's filing suit in the United States District Court seeking a trial de novo of his claims of discrimination in connection with a 1981 denial of a WIG increase,the Petitioner's work assignments were changed in ways which strongly suggest retaliation by the Agency.

For instance, James Dayton and Gerald DeRyder were co-workers of long standing with Petitioner. Each testified that Petitioner was treated differently from other AFMD computer specialists after he filed his EEO complaints; that the types of assignments given to Petitioner were out of the ordinary; and that Petitioner was the only person in the Accounting and Financial Management Division

who was not assigned to perform work on the review of systems design. Dayton and DeRyder also testified that Petitioner's work cubicle was moved out into the hallway after Petitioner filed his EEO grievance. Similarly, Ronald Eckman, an accountant who had worked with Petitioner in the AFMD for almost ten years, testified that Petitioner was treated differently when his work cubicle was moved to the corridor; that he observed Petitioner under constant and abnormal scrutiny after his cubicle was moved to the corridor; and that Petitioner's conversations were being monitored. Eckman further testified that it was the primary job of the accountants,not the ADP specialists in the AFMD, to perform the General Risk Assessment and Transaction Flow Review in developing an ADP test plan. Dayton, DeRyder and Eckman all testified that Petitioner was competent as a computer specialist. Eckman further testified that he had witnessed Jack Kearns, who was Petitioner's supervisor before Moortgat, go into Petitioner's office and throw papers on

Petitioner's desk. This occurred shortly after Petitioner had filed his suit, in which Kearns was named as a defendant.

The direct evidence on the record not only constitutes prima facie proof of the Agency's concerns about Petitioner's pending EEO grievances, but it also confirms that prior actions were taken in reprisal for Petitioner's protected activity. Taken alone, some of the testimony and evidence on the record seem merely questionable. Reading the record as a whole, however, the sheer number of the inconsistencies is compelling.

For instance, on several occasions, Robinson and Moortgat gave contradictory testimony. We have already noted their reversals of their positions on the scope of Petitioner's 60-day OCHAMPUS assignment as one requiring Petitioner to do a General Risk Assessment, then do a Transaction Flow Review, then do an ADP Test Plan. Later, they insisted that the assignment was to plan the GRA, plan the TFR, and plan the Test Plan. Robinson also testified that some of Petitioner's

assignments, especially the Microfiche Order, were simple routine tasks. but in the performance appraisal she prepared on Petitioner in August 1982 she stated that Petitioner's work was a "pioneering effort" that was made up of "fairly complex" tasks. When cross-examined as to the discrepancies in these characterizations, however, she stated that the August performance appraisal was overly generous, and could not really substantiate why she had so drastically changed her assessment of Petitioner with the May 1983 performance appraisal that formed the basis for the initial denial of Petitioner's WIG increase and Petitioner's placement on the 60-day opportunity program. In preparing that performance appraisal, Moortgat stated that Petitioner had been two weeks late with one chapter of the Model ADP Documentation assignment, and four weeks late with another chapter of the assignment, and that neither chapter was satisfactorily completed. Again, however, in his testimony at the hearing, Moortgat could not testify with certainty that

Petitioner had actually been late with either of the Model ADP Documentation chapters, nor could the Agency furnish a copy of Petitioner's final work product to show the exact manner in which it was deficient. We find that these frequent contradictions seriously impact the credibility of Robinson and Moortgat.

In addition to these factors, and some of the other inconsistencies as noted herein, the Board is particularly struck by the following facts:

1. That at least one qualified expert testified that the new Systems Approval Methodology which Petitioner was required to implement under both his 60-day and 90-day opportunity period assignments was extremely difficult to perform because it was so new that no background information was available to be used as a standard and no criteria had been established for the accounting portion of the GRA;

2. In September 1983 Petitioner submitted a plan for completion of his 90-day

assignment which effectively proposed a new timetable for completion of the assignment, and, while both Moortgat and Robinson were aware that the timetable proposed by Petitioner would take him substantially past the expiration of his 90-day opportunity period, neither counseled him that these milestones were unacceptable;

3. The admission by Moortgat that 60 days was probably not enough time to complete the OCHAMPUS assignment;

4. The testimony by Lee Beaty, a computer specialist was a CPA, that it was the consensus of opinion of the computer specialists that the new Systems Approval Methodology could not be implemented by them because they had had no training or experience in it; yet this was the assignment Petitioner was given to do;

5. The opinion by Beaty and several of his Peers that Petitioner was competent as a computer specialist;

6. When Petitioner was given the 60-day OCHAMPUS assignment, the accountant he had

previously worked with was reassigned by Robinson. However, even though an accountant was generally considered to be indispensable to performing a GRA and TFR under the new Systems Approval Methodology, Moortgat never told Petitioner that a new accountant was available to work with him;

7. Robinson and Moortgat stressed the importance of the team approach for assignments within the AFMD, but every assignment Petitioner received after he filed his EEO complaint was an assignment that he was required to work on alone, even though an accountant-computer specialist team was said to be critical for work under the new methodology.

We have previously discussed the confusing nature of the assignments given to Petitioner. It is not clear from this record that Petitioner's work performance was objectively and impartially evaluated.

It is very clear that, prior to Petitioner's filing of his EEO grievances, he had performed acceptably for over ten years. Although it

can be argued that Petitioner's work left something to be desired (a finding that we need not make), Petitioner's performance does not rebut the strong record evidence of the Agency's intent to retaliate.

Under these circumstances, we do not think Petitioner was afforded a fair opportunity to demonstrate acceptable performance, given the assignments selected for Petitioner during the period following his filing of the EEO grievances, and given the circumstances attendant to his efforts to comply with his supervisors' directives.

In her review of Petitioner's arguments, the Hearing Officer states that there is no evidence that the Agency's actions were motivated by a desire to retaliate against Petitioner for the exercise of his appeal rights. On the contrary, based on he record when viewed as a whole, the Board finds that the adverse actions taken by the Agency against Petitioner were in reprisal for his protected EEO activities. The Board further finds that without the denial of Petitioner's

WIG salary increase, there would be no cause for th removal of Petitioner, and we hereby order that Petitioner be reinstated effective immediately, with back pay as provided for the by the Back Pay Act.

In view of these findings and conclusions, we need not discuss further the other issue raised by the parties.

/s/
Ira F. Jaffe, Chairman

/s/
James M. Brown

/s/
Charles Feigenbaum

/s/
Jessie James, Jr.

/s/
Jonathan E. Kaufmann

Dated: July 10, 1986

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Thus, in evaluating the entire record in this case, the Board considered as significant the following:

(1) Petitioner was not counseled by Kearns until nearly 10 months after Kearns' selection as his supervisor;

(2) In August 1980, Kearns found Petitioner's performance to be satisfactory, but six weeks later he initiated a counseling session with Petitioner;

(3) Petitioner's previous supervisors consistently found Petitioner's performance to be satisfactory or better;

(4) Kearns' initial counseling session with Petitioner occurred one day after Petitioner initiated his

informal EEO complaint and one day before Kearns met with Petitioner's EEO Counselor;

(5) The evidence is contradictory as to whether the accounting group headed by Reifsnyder or the ADP group headed by Kearns was responsible for the delays in completing the HUD audit in a timely fashion;

(6) The testimony is in conflict as to the nature of various meetings held in 1981 in which Petitioner, Reifsnyder, Dasher and others participated regarding the HUD audit;

(7) Petitioner had a target date of September 30, 1981, to complete his portion of the HUD project, not June 12, 1981; and

(8) While there may well have been

serious problems with Respondent's audit of HUD, Petitioner was not the source of those problems.

Accordingly, on the record as a whole, the Board is persuaded that the facts in evidence in this case indicate that:

(1) There is at least circumstantial evidence that the Petitioner was denied his within-grade salary increase at least in part because of his having filed a complaint of discrimination against Kearns and other management officials; and

(2) The evidence presented by Respondent does not substantiate the grounds relied upon by management in denying the Petitioner's within-grade salary increase.

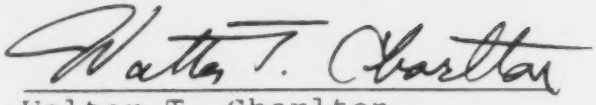
Therefore, the Board finds that

Respondent improperly denied Petitioner's within-grade salary increase due June 14, 1981.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of January, 1991, pursuant to Rules 19.3, 28.3 and 28.4(a) of the United States Supreme Court Rules, I caused three copies of the foregoing Appearance Form and Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to be deposited in the U.S. mail and mailed first class, postage prepaid to the Solicitor General, United States Department of Justice, Washington, D.C. 20530, to Carl Moore, Esq. General Counsel, General Accounting Office Personnel Appeals Board, 441 G Street, N.W., Washington, D.C. 20548, and to General Counsel, U.S. General Accounting Office, 441 G Street, N.W., Room 7083,

Washington, D.C. 20548.



Walter T. Charlton
Counsel of Record for the
Petitioner

(2)

No. 90-1072

In the Supreme Court of the United States

OCTOBER TERM, 1990

ALFRED E. RAMEY, PETITIONER

v.

UNITED STATES GENERAL ACCOUNTING OFFICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether employees of the GAO were entitled to absolute immunity from common-law tort claims arising from adverse personnel actions against petitioner.

2. Whether the district court's finding that the GAO did not discriminate against petitioner on the basis of his sex was clearly erroneous.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1c-11c) is reported at 915 F.2d 731. The opinions of the district court (Pet. App. 1a-9b) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1990. The petition for a writ of certiorari was filed on January 3, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1980, petitioner, who was then a GS-13 computer specialist with the General Accounting Office, competed with eight other applicants for a promotion to a GS-14 posi-

tion. When respondent Kearns awarded the position to a female employee, petitioner filed an administrative complaint alleging that the decision was the result of sex discrimination. Thereafter, petitioner was denied a within-grade increase, and he amended his administrative complaint to allege retaliation and reprisal. Pet. App. 2c-3c.

The GAO Personnel Appeals Board determined that petitioner's nonselection for the GS-14 position did not result from sex discrimination, but also held that the denial of petitioner's within-grade increase resulted "at least in part" from petitioner's filing of the discrimination claim. Accordingly, the Appeals Board awarded petitioner the within-grade increase that had been withheld. Pet. App. 3c; see *id.* at 1e-4e.

Not satisfied with this relief, petitioner filed the instant action in district court against respondents GAO and Kearns. His complaint alleged that the GAO had discriminated against him on the basis of his sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and that Kearns had committed various common-law torts, including libel, slander, civil fraud and conspiracy. In 1983, while the suit was pending, the GAO denied petitioner a within-grade salary increase and terminated his employment. Petitioner amended his complaint to bring common-law tort claims against the other individual respondents, all GAO employees. In 1986, the Personnel Appeals Board of the GAO ruled that the adverse actions taken against petitioner in 1983 were in reprisal for his protected EEO activities. Accordingly, the Board ordered petitioner reinstated with backpay. Pet. App. 3c, 1d-7d, 43d-44d.

2. In the meantime, in this case, the district court granted pretrial motions to dismiss petitioner's common-law tort claims against the individual respondents. Pet. App. 3c-4c; see *id.* at 1a-6a. The district court held that those

respondents were absolutely immune from all such claims. *Ibid.*

Petitioner's Title VII claim against the GAO proceeded to trial. At the close of the evidence, the court dismissed the action. The court found that petitioner's expert, on whose testimony petitioner was relying to prove discrimination in the promotion of the female applicant instead of petitioner, had been "thoroughly discredited" and that "there [was] simply no credible evidence * * * of gender playing any part in this employment decision." Pet. App. 7b, 9b; see *id.* at 4c.

3. The court of appeals affirmed. Pet. App. 1c-11c. With respect to the individual respondents, the court held that "each supervisor was entitled to assert his official immunity as an absolute bar to [petitioner's] tort claims." *Id.* at 4c. The court applied the two-part test set forth by this Court in *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), under which employees are absolutely immune from state-law tort liability if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." The court of appeals concluded that "it cannot seriously be disputed that [the individual respondents] acted within the scope of their official duties" and further ruled that the allegedly tortious conduct was " 'the product of independent judgment,' and the 'exercise [of] decisionmaking discretion,' of the sort described * * * in *Westfall*." *Id.* at 5c-6c.

Regarding petitioner's Title VII claim against the GAO, the court found "no error in the District Court's judgment that Ramey was not a victim of sex discrimination," noting that this determination was subject to review only under the clearly erroneous standard. Pet. App. 7c (citing *Pullman-Standard* v. *Swint*, 456 U.S. 273, 290 (1982);

Anderson v. *City of Bessemer City*, 470 U.S. 564, 573-575 (1985)).[1]

ARGUMENT

1. Under *Westfall* v. *Erwin*, 484 U.S. at 300, federal employees are absolutely immune from state-law tort liability if "the challenged conduct is within the outer perimeter of an official's duties and is discretionary in nature." Petitioner contends that the tortious acts alleged in his complaint were unlawful and "therefore *cannot be* legally cognizable as within the 'outer perimeter' of official duties." Pet. 32.

As the court of appeals recognized, acceptance of that contention would effectively abolish official immunity. "No government officer, of course, can be 'authorized' to act unlawfully. But if the scope of an official's authority or line of duty were viewed as coextensive with the official's lawful conduct, then immunity would be available only where it is not needed; in effect, the immunity would be 'completely abrogate[d].'" Pet. App. 6c. The court of appeals noted—and the petition does not dispute—that "[t]he alleged torts committed by the supervisors arose out of their evaluation of [petitioner's] work performance, their hiring and firing decisions, and their testimony at the administrative adjudicatory proceedings." *Id.* at 5c. On their face, those actions were within the outer perimeter of the supervisors' responsibilities; the fact that petitioner has alleged that those acts were tortious under state law does not deprive the supervisors of their entitlement to immunity.[2]

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[1] The court of appeals also rejected petitioner's claims concerning alleged errors in the trial proceedings. Pet. App. 10c-11c. The petition does not seek further review of those questions.

[2] Petitioner repeatedly suggests that the individual respondents are collaterally estopped by the decision of the GAO's Personnel Appeals

The enactment of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Reform Act), Pub. L. No. 100-694, 102 Stat. 4563-4567, does not undermine the individual respondents' entitlement to immunity or otherwise enhance petitioner's claims. The purpose of that statute is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment." Reform Act, § 2(b). To that end, Section 5 of the Reform Act, 28 U.S.C. 2679(b)(1), provides that the remedy against the United States conferred by the Federal Tort Claims Act for personal injury or property damage resulting from torts committed by federal employees acting within the scope of their employment is "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employees whose act or omission gave rise to the claim." If the Attorney General or a court certifies that an employee named as a defendant was acting within the scope of his or her employment at the time of the incident out of which the claim arose, the United States is substituted as the de-

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Board from claiming that they were acting within the scope of their authority with respect to the matters involved in this action. There is no merit to that contention. First, the individual respondents were not parties in the administrative proceeding and thus could not be bound by any findings the Board made. Second, the Board had no occasion to consider whether those respondents had acted beyond the outer perimeter of their duties, whether their actions were tortious, or whether petitioner was thereby entitled to any relief beyond that awarded by the Board. The only issue before the Board was whether particular personnel actions – the 1983 denial of a within-grade salary increase and petitioner's subsequent termination – should be sustained. Assuming for purposes of argument that the Board's unappealed ruling on that question would be entitled to collateral estoppel effect, it would not bar a determination, in petitioner's district court suit, that the individual respondents were acting within the outer perimeter of their official duties.

fendant and the case proceeds as though it had been commenced against the United States under the FTCA.[3] Section 6 of the Reform Act, 28 U.S.C. 2679(d).

The Act exempts two categories of claims—actions based upon a violation of the Constitution and actions based upon a violation of a federal statute—from its otherwise unqualified prohibition on actions against federal employees sued for torts committed within the scope of their employment. Section 5 of the Reform Act, 28 U.S.C. 2679(b)(2). Actions encompassed by those exceptions may be brought and pursued against individual federal employees to the extent permitted by otherwise applicable law, but they remain subject to any available defense of official immunity. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982) ("government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

Significantly, the Reform Act has no effect on the scope or effect of the immunities that may be asserted in actions against federal employees. Moreover, the Reform Act's exceptions for actions based upon a violation of the Constitution or a federal statute are irrelevant to petitioner's claims. Petitioner's complaint does not assert federal statutory or constitutional claims against the individual respondents; in any event, the effect of those exceptions is merely to permit suits against federal employees under otherwise applicable law, not to alter the scope of the immunity available in any such suit.[4] Those exceptions thus lend no support

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[3] The Reform Act was not enacted until after the individual respondents had been dismissed from the action and the case was pending on appeal. Accordingly, no certification under the Reform Act was issued or sought.

[4] It is of course well settled that a Title VII action against the appropriate federal agency "provides the exclusive judicial remedy for

to petitioner's assertion that an act or omission that violates state tort law is necessarily beyond the scope of a federal employee's employment.[5]

2. Petitioner argues that the district court's finding that the GAO did not discriminate against him on the basis of his sex was clearly erroneous. Pet. 34-36. For the reasons set forth in detail in the court of appeals' opinion (Pet. App. 7c-10c), the record amply supports the district court's determination that petitioner was not the victim of sex discrimination. It has long been this Court's practice, absent extraordinary circumstances, not to disturb concurrent factual

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claims of discrimination in federal employment." *Brown* v. *GSA*, 425 U.S. 820, 835 (1976). Thus, the individual respondents' alleged violations of Title VII cannot give rise to a damages claim against them in their individual capacities.

[5] All of petitioner's state-law claims against the individual respondents would be foreclosed, if the United States were substituted as the defendant in this case, by exceptions to the Federal Tort Claims Act. See 28 U.S.C. 2680(a) (barring claims arising out of "discretionary function[s]"); 28 U.S.C. 2680(h) (barring, *inter alia*, claims for libel, slander and misrepresentation). This Court granted certiorari in *United States* v. *Smith*, No. 89-1646 (June 11, 1990), to determine whether the Reform Act applies (as we argue on behalf of petitioners that it does) to common-law tort claims that may not be pursued against the United States by virtue of FTCA exceptions. Petitioner would derive no benefit from a decision in favor of the respondents in *Smith*. In *Smith*, the respondents contend that they should be permitted to pursue an action against an individual federal employee, rather than being limited to an action against the United States which would be barred. Here, petitioner commenced an action against federal employees, and the court of appeals held that petitioner's claims against those employees are barred. Of course, if the government were to prevail in *Smith*, the Court's ruling would provide an additional ground for dismissal of the claims commenced against the individual respondents; upon a certification that the individual respondents were acting within the scope of their employment, the United States would be substituted as the defendant and the case would be subject to dismissal under exceptions to the FTCA.

findings by an appellate and a trial court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985); *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). There is no reason for the Court to depart from that practice in the instant case. Petitioner's challenge to the district court's assessment of the evidence presents no question warranting this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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